



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT OF KENYA AT NAIROBI
CAUSE NO. 1398 OF 2012

KENYA NATIONAL PRIVATE SECURITY

WORKER'S UNION.....CLAIMANT

VERSUS

INTER-SECURITY SERVICES LTD.....1ST RESPONDENT

JUDGMENT

The Claimant herein a trade Union registered in Kenya filed this suit against the Respondent by memorandum of claim dated 14th August 2012 on behalf of it's member Samwel Alal seeking the following orders: -

1. One month salary in lieu of notice
2. Annual /prorate leave of 10 years
3. Off/rest day for 10 years. (52 days per year)
4. Public olHolidays for 10 years
5. Underpayment of wages.
 - a. Basic salary
 - b. House allowance
 - c. Overtime for extra hours worked
6. Uniform refund money deducted
7. Gratuity /severance pay for 10 years
8. Any other legal claim
9. Certificate of service

The Respondent filed its Memorandum of Response on 7th May 2013, in which it denies the claim and prays that the Claimant's case be dismissed with costs.

The case was heard on 13th November 2013. The Claimant was represented by Ms Onyancha, a Legal Officer with the Claimant while the Respondent was represented by Ms Magotsi instructed by Wafula Simiyu & Company advocates.

The Claimant called Samuel Alal Nyalieo, the grievant as its witness while the Respondent called Henry Owaga, who works for the Respondent in Accounts and Operations Department .

The Grievant testified that he was employed by the Respondent in October 2007 as a security guard and was dismissed on 3rd December through an undated letter of dismissal. The circumstances leading to his dismissal were that on 15th October 2011 he reported to work at 5.30 pm at Eagle Church where he was deployed on night duty. There was a meeting at the Church which ended at about 7.00 pm. The day guard had to leave at 6.00 pm so there was no handing over due to the presence of the people attending the meeting. He was joined by his fellow night guard Mr. Okundi at 6.00 pm. At about 7.10 pm after all the visitors' cars had left the Claimant decided to inspect the compound. While inspecting the compound he heard a car hooting but assumed it was at a nearby bus stop. When the hooting persisted he ran towards the gate and saw a car waiting. By the time he reached the gate he saw the car reversing. After about two minutes the Inter Security Patrol car arrived at the gate where the driver of the patrol car found him waiting. The driver informed the grievant that he had received a call from the Managing Director reporting that the grievant was not at work. The driver then called the Managing Director who spoke first with the driver and then to the grievant and told him to continue working. He worked until 18th October 2011 when he was called to report at the office. At the office he was informed that the Eagle Church contract had been terminated. He was issued the letter of dismissal on 3rd December 2011. Mr. Okundi his co-worker was also dismissed but was later re-instated after intervention by the Union. The grievant was not re-instated on the ground that he was old. He was about 67 years old at the time of dismissal. At a meeting between the Claimant union and the Respondent, an offer was made to settle the claim at Shs. 48,000/- which the Claimant and the grievant declined as it was much lower than what was demanded at Shs. 1,564,567/- . The Grievant's last salary was Shs. 8276 per month.

RW1 testified that he had worked for the Respondent for one year 3 months and was familiar with the case of the grievant. That the grievant was dismissed due to misconduct which led to two contracts being terminated. He testified that the grievant applied for off days which he was granted on some occasions and denied on other occasions. That the Respondent did not settle the claim of Shs. 1,564,567/- because there was no basis for the claim. That he was not aware of the date on which the grievant was employed. He testified further that he did not see any warning letters in the Grievant's file and that he was not the one who dismissed the grievant.

I have considered the pleadings, the documents submitted by the parties and the viva voce evidence. I have also considered the Claimant's written submissions. It is important to mention here that the Respondent did not file its written submissions in spite of being granted two opportunities to do so by the court.

The issues for determination are the following :-

- i. Whether the dismissal of the grievant was lawful.
- ii. Whether the grievant is entitled to the prayers sought.

1. Was the dismissal lawful and fair?

The Grievant's letter of dismissal is not dated. The letter reads as follows (copy letter).

The letter does not refer to any hearing having taken place or the grievant having been asked to defend himself in terms of Section 41 of the Employment Act. The letter does not show that fair procedure was applied.

The letter which the grievant testified was handed to him on 3rd December 2011 refers to two incidents of misconduct one which occurred on 15th October 2011 and another one which is alleged to have occurred earlier on 17th February, 2011.

RW1 testified that he had only worked for the Respondent for (one) year 3 months by November 2013. It therefore follows that he was not in the Respondent's employment when the grievant was dismissed in December 2011.

He testified that he did not see any warning letters in the Grievant's records of employment, that warnings were usually considered by the Respondent before dismissing an employee and that he was not the one who dismissed the grievant.

Having not been given a hearing, the dismissal of the grievant was unfair within the meaning of Section 43 and 45 of the Employment Act.

2. Is the Claimant entitled to his prayers?

I will consider the prayers in the order in which they are pleaded.

i. One month's salary in lieu of notice.

Having been unfairly dismissed the grievant is entitled to one month's gross salary as notice as provided in Section 49 (1) (a) and 36 of the Employment Act.

I therefore award the Claimant the sum of Shs. 9403.30 being one month's salary at the rate of gazetted minimum basic salary for night watchman plus 15% house allowance.

ii. Annual leave for 10 years.

The grievant testified that he was never granted annual leave for the entire period that he worked. The Respondent did not deny that the grievant was never granted leave in its Memorandum of Reply.

RW1 stated that he was not aware of any documents other than the off days requests letters that were produced in the Respondent's bundle.

Section 19 (7) as read together with Section 10(6) and Section 74 of the Employment Act requires employers to keep prescribed records of employment which include an employee's annual leave entitlement, days taken and days due specified in Section 28. Where in any legal proceedings the employer fails to produce such records the burden of proving or disproving an alleged term of employment shifts to the employer.

Having failed to produce any records or to disprove the Grievant's allegation that he never took leave, I award the grievant the sum of Shs. 59,241.00 being annual leave for 10 years at the rate of 21 working days per year based on basic salary of Shs. 8463/-.

iii. Off / Rest Days

The Respondent did not deny that the grievant was never granted any off days or prove that he was paid whenever he worked on rest days. The grievant was entitled to at least 52 rest days every year. This amounts to 520 days for the 10 years he worked. At a basic salary of 8463 this amounts to Shs. 293,384/- based on twice the hourly rate as provided in both the Regulation of wages and conditions of Employment (General) order and the Regulation of Wages Conditions of Employment (Protective Security) Order.

I therefore award the grievant the sum of Shs. 293,384/- .

iv. Public Holidays

The Respondent did not deny the Grievant's allegation that he did not get an off day for work performed on public holidays or was paid at double the hourly rate for work performed on such public holidays. The grievant was entitled to the 11 public holidays per year. At the double hourly rate for 10 years this

amounts to Kshs 62,062/- .

I award the grievant the said sum of Shs. 62,062/-

v. Underpayments

The Claimant seeks underpayments for 6 months based on the statutory minimum rates that were effective from 1st May 2011. The Respondent has not denied the same.

I award the same as tabulated by the Claimant as follows:-

- a. Basic pay Shs. 1,122
- b. House allowance Shs. 1,614
- c. Overtime Shs. 3,158
- d. Underpayments for 2010

- i. House allowance Shs. 1,536
- ii. The Claim for underpayments for overtime for 2010 is dismissed as the Claimant has not demonstrated how it arrived at the hours making up the sum claimed of Shs. 31,358.

vi. Uniform deductions.

The Respondent did not deny that it has not refunded the grievant the sum of Shs. 2400 deducted on account of uniform.

I therefore award the grievant the sum of Shs. 2400 on account of the same.

vii. Gratuity

The Regulation of Wages and Conditions of Employment (Protective Security) Order provides for payment of gratuity at 18 days salary per year worked for all employees in the protective security Industry who have worked for a minimum period of 5 years. The Respondent indeed admitted this claim but offered to pay only Shs. 48,000/- based on 15 days per year.

I award the grievant the sum of Shs. 50,778/-.

viii. Certificate of Service

The grievant is entitled to a certificate of Service as provided in Section 51 of the Employment Act. The Respondent to issue the same to the Claimant within 30 days.

ix. 12 months Compensation.

This was not claimed in the memorandum of claim. It is only claimed under the written final submissions. Since the Respondent did not have an opportunity to respond to the claim the same is denied.

Conclusion

The Respondent is directed to pay the sums awarded herein, within 30 days failing which the Claimant may apply for execution of the same together with interest at court rates from date of judgment.

Orders accordingly.

Read in open Court this 9th day of May, 2014

HON. LADY JUSTICE MAUREEN ONYANGO

JUDGE

In the presence of:

Ms. Onyancha for Claimant

No appearance for Respondent